IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 693 of 2007

IN

NOTICE OF MOTION NO.2850 of 2006

M/s Asian Marble Industries ..Appellant

V/s

M/s Shree Balaji Developers and Anr...Respondents

Shri N.V.Walawalkar i/b Rajesh S. Sharma and Associates for the Appellant

Shri K.P.Tiwari i/b K.P.Tiwari and Co. for the Respondents

CORAM: S.R.SATHE,J.

DATED: 27-9-2007

P.C.:-

1. Heard both the learned Advocates at length.

2. Appeal is heard finally at admission stage.

3. The Appellant the original defendant no.1 in Long Cause Suit NO.2883 of 2006 has filed the present appeal against the order passed by the Judge, City Civil Court,

Grater Bombay in Notice of Motion No.2850 of 2006 whereby plaintiff's application for temporary injunction restraining the Appellant original defendant no.1 was allowed and the defendant no.1 was restrained from dealing with, disposing of, alienating, encumbering and/or creating any third party rights in any manner and entering upon,interfering the plaintiffs' possession of the suit property viz. car parking garages, open car parking spaces, basement car parking and spaces in compound advertising spaces on the entire property and terrace on the 6th floor of the building known as Kotia Nirman,B Wing, Ambewadi,Andheri (West), till the disposal of the suit. For the sake of convenience hereafter the parties shall be referred to as the plaintiffs and defendants.

4. Brief facts giving rise to this appeal are as under:-

. Plaintiff M/s Shree Balaji Developers are the owners of half property of the plot no,2, Shah Industrial Estate, Link Road, Andheri bearing CTS No.844/3 Revenue village Amboli,Taluka Andheri. The said property is admesuring about 2417 sq.mtrs. The owner demolished the old structure and submitted the plans for redevelopment of the said property and commencement certificate was issued on 14-7-2003.

5. On 18-6-2004 the owner viz. defendant no.1 executed development agreement in favour of the plaintiffs M/s Shree Balaji Developers. The plaintiff proposed building at the suit site was to consist basement, ground and 6 upper floors. There was understanding between the plaintiffs and defendant no.1 to share the said construction portion in equal proportion. The plaintiffs was to arrange funds for constructing proposed building. The plaintiffs also executed 4 memorandums dated 22-2-2004, 25-5-2004, 4-1-2005 and 14-4-2005 with the defendant no.1. The plaintiffs carried out the construction as per development agreement. However, dispute arose between plaintiff and the defendant no.1. According to the plaintiffs the defendant no.1 pressurised the plaintiff and open an account of Shri Balaji Developers at Canara Bank, Mahim Branch in the owners' bank and forcibly took letter of authority from the Plaintiffs for handing over funds coming from the respective purchasers. As a result no funds were received by the plaintiffs and ultimately memorandum of understanding dated 30-12-2005 was executed whereby it was agreed that out of 37 units the plaintiffs can sale 15 units as specified in the memorandum of understanding. According to the plaintiffs though defendant no.2's solicitor were aware of the fact that the plaintiff has already created third party rights in favour of one Divya Kohli, Prop. of M/s Aliance International, the defendant no.2 issued title

certificate to the defendant no.1 in respect of office nos.201, 202 on 2nd floor of the suit building and office no.404 of 4th floor of the suit building known as Kotiya Nirmana.

6. The plaintiff came to know that the defendant no.1 is negotiating and trying to create third party right in respect of various units of the suit building as well as in respect of car parking garages, open car parking space, basement car parking spaces and advertising space and in fact trying to take forcible possession of the suit property from the plaintiffs. Hence plaintiffs filed a suit for declaration that the development agreement dated 18-6-2004 executed by the defendant no.1 in favour of the plaintiffs is valid and subsisting and binding on the plaintiffs as well as the defendant no.1’s action of creating third party interest in respect of the suit property is illegal and invalid. Plaintiffs also prayed for permanent injunction restraining defendant no.1 from creating third party interest in respect of the suit property.

7. The plaintiffs filed Notice of Motion No.2850 of 2006 and prayed for temporary injunction restraining the defendants from creating third party interest in any manner and dispossessing the plaintiffs from the suit property till the disposal of the suit.

8. On behalf of the defendant no.1 prop.M/s Asian Marbal viz. Murlidhar Kotia filed affidavit in reply and opposed the Notice of Motion. Firstly, he contended that the city Civil Court has no jurisdiction to try the present suit as the reliefs claimed by the plaintiff was susceptible to monetary value and the agreement in question dated 18-6-2004 was in fact registered by the plaintiff after valuing it at Rs.2,49,00,000/- and so the plaintiff's suit ought to have been valued accordingly and if so valued the City Civil Court has no jurisdiction to try the said suit. The defendant therefore contended that the suit as well as the Notice of Motion are liable to be dismissed on that ground alone.

9. The defendant no.1 further contended that development agreement dated 18-4-2004 is terminated by the defendant by valid and subsisting MOU dated 30-12-2005 executed between the plaintiffs and defendants and hence plaintiffs are not entitled to get any relief as claimed. According to the defendant, as per development agreement clause 4, the developer was entitled to 9000 sq.ft. carpet area which is earmarked as units 1 to 6 of 2nd floor, unit 1 to 6 on 3rd floor and unit nos.1 to 6 on 4th floor and plaintiffs were entitled to sale the same. However, as per clause 15 of the development agreement the development was to be completed within 21 months from 14-7-2003 but the

plaintiffs failed to complete it accordingly and hence MOU dated 30-12-2005 was executed by the plaintiffs and the defendant no.1. The defendant no.1 also contended that as per MOU the plaintiff confirmed that only 15 units were sold by the plaintiff and some balance amount was to be received from the Purchasers of the said units. However, the defendant no.1 was given right to recover the said balance and complete the balance work at the cost and risk of the plaintiffs.

10. The defendant also contended that the plaintiffs not only failed to complete the development but he indulged into double sale of the ownership premises and also tried to crate further third party interest in respect of 3 units i.e. office nos. 201, 202 and 404 and therefore the defendant no.1 issued letter dated 23-6-2006 to the plaintiffs and called upon them to perform MOU dated 30-12-2005. As a result of the plaintiffs' failure to comply MOU the defendant in fact filed Suit No.2048 of 2006 against the plaintiffs in the High Court at Bombay. The defendant also contended that it was never agreed to share equally the basement, ground and 6 upper floors between the plaintiffs and defendant no.1 and there was no need to have any such oral understanding as alleged by the plaintiffs. The defendant specifically contended that the plaintiffs are not entitled to the suit property i.e. car parking garages, open garage parking space, basement car parking

etc. The defendants therefore contended that the plaintiffs are not entitled to get temporary injunction as prayed. Hence on all these grounds the defendants prayed for the dismissal of Notice of Motion.

11. After hearing arguments of both the learned Advocates and considering the documents produced by them, the learned trial Judge came to the conclusion that in 2 cases though purchasers had purchased units from the defendant no.1 they had purchased car parking space from the plaintiffs, the defendant no.1 had not taken any objection for the same and thus these two instances indicate that plaintiffs had acquired right in respect of the suit property. The learned trial Judge also held that car parking garages,open garage parking space were given to the plaintiffs as they paid premium to the Bombay Municipal Corporation and secure additional benefits for the project, the learned trial Judge also held that the suit is properly valued and the plaintiffs have made out a prima facie case and balance of convenience is in favour of the plaintiffs. He therefore granted temporary injunction against the defendant no.1 as prayed.

12. The above mentioned order is challenged in the present appeal. In this appeal before me, Shri Walwalkar, learned Senior Advocate for the Appellant has urged only three points. Firstly, he submitted that

suit was not at all properly valued by the plaintiffs. If proper valuation would have been made then the City Civil Court had no pecuniary jurisdiction to entertain the said suit. He therefore submitted that plaintiffs' suit and Notice of Motion are liable to be dismissed on that ground alone. Secondly, he canvassed before me that the learned trial Judge has granted relief which is not based on the pleadings and as such the order is illegal. Lastly, he submitted that as per the development agreement plaintiffs are not at all entitled to the suit property and they were entitled for 18 units as per development agreement and 15 units as per MOU. So, in any event the plaintiffs have not made out any prima facie case to show that the Plaintiffs are having any right in respect of the suit property. He therefore, submitted that the appeal be allowed and the order passed by the trial Court be set aside.

13. As against this Shri Tiwari, learned Advocate for the Respondent no.1 original plaintiff supported the order passed by the learned trial Judge.

14. It is not in dispute that the defendant no.1 is having half share in the suit property bearing CTS no.94/3 Ambedwadi Village, Andheri. It is also an admitted fact that development agreement was executed on 18-6-2004 between plaintiffs and defendant no.1. It is clear that plaintiffs are seeking declaration to the

effect that the said development agreement is valid and in existence and consequentialy they are seeking relief in respect of the suit property which is consisting of car parking garages, open car parking space and basement car parking space, advertising space. The plaintiffs have stated in their plaint that relief claimed by them is not susceptible to monetary value and as such they have valued the suit at Rs.1,000/- and paid the necessary court fee stamp. The learned Advocate for the defendant no.1 strenuously argued before me that the suit is not properly valued. According to him it should have been valued as per valuation of the suit property as ultimately the relief is claimed in respect of the suit property. It is needless to say that while determining the question regarding the suit valuation and court fee one has to see the averments in the plaint and find out what in substance the relief is claimed. In other words, what is the suit for. In the instant case the plaintiffs are claiming declaration that the development agreement dated 18-6-2004 is valid and subsisting and on that basis they are in fact claiming proprietary rights in respect of the suit property. According to Plaintiffs they are having a right to sale the suit property and take purchase money of the same. If such is the position, then obviously it means that the suit is in respect of proprietary rights in respect of the suit property. It is an admitted fact that the suit agreement was got registered by plaintiff by

valuing the same at Rs.2,49,00,700./-. So, now it does not lie in the mouth of the plaintiff that the relief claimed by the plaintiff is not susceptible to monetary value. While considering this aspect useful reference can be made to Section 6(iv)(d) of the Bombay Court Fees Act, 1959. The said provisions runs as follow:-

> 6. Computation of fees payable in certain suits The amount of fee payable under this Act in the suits next hereinafter mentioned shall be computed as follows :-
>
> (iv) (d) for ownership etc. of immovable property, etc.
>
> . In suits for declaration in respect of ownership, or nature of tenancy, title, tenure, right, lease, freedom or exemption from, or non liability to, attachment with or without sale or other attributes, of immovable property, such as a declaration that certain land is personal property of the Ruler of any former Indian State or public trust property or property of any class or community one-fourth of ad valorem fee

leviable for a suit for possession on the basis of title of the subject-matter, subject to a minimum fee of {one hundred rupees}.

. Provided that if the question is of attachment with or without sale the amount of fee shall be the ad valorem fee according to the value of the property sought to be protected from attachment with or without sale or the fee of {sixty rupees}, whichever is less:

. Provided further that, whenever the defendant is or claims under or through a limited owner, the amount of fee shall be {one third} of such ad valorem fee, subject to the minimum fee specified above.

. Provided also that, in any of the cases falling under this clause except its first proviso, when in addition any consequential relief other than possession is sought the amount of fee shall be one-half of ad valorem fee and when the consequential reliefs also

sought include a reilef for possession the amount of fee shall be the full ad valorem fee;

15. So, I have no hesitation to hold that in the instant case the plaintiffs ought to have valued the suit and paid the court fees stamp having regard to the above provisions. Considering the value of the immovable property in city of Mumbai and having regard to the area in respect of which the plaintiffs are claiming right and alleging that they are entitled to sale the said spaces and defendant no.1 is not entitled to crate any third party right in respect of the same the valuation of the suit is certainly far far more than Rs.50,000/- which is the limit of pecuniary jurisdiction of the City Civil Court of Bombay. So, in my opinion, the learned trial Judge ought to have held that the suit is not properly valued and the City Civil Court has no jurisdiction to try the said suit. So, under such circumstances the learned trial Judge ought to have returned the plaint for presentation to the proper Court. So, in any event under such circumstances the learned trial Judge should not have granted interim relief as claimed because the said Court was not in a position to grant the final relief for want of pecuniary jurisdiction.

16. Turning to the merits of the case it must be noted that in the development agreement dated 18-6-2004 in clause no.4 it is mentioned :

> Clause 4 : In consideration of the developer completing the entire development of the said property the developer shall be entitled to 9000 sq.fts. carpet area agreed to be allotted to the developer is earmarked as unit Nos. 1 to 6 on the second floor, unit Nos. 1 to 6 on the third floor and unit Nos. 1 to 6 on the fourth floor in aggregate 18 units. Since the consideration for allotment of free of costs carpet area is against the developer completing the entire development of the said property the rights of the developer to sell, assign, transfer, let, lease charge mortgage said 9000 sq.fts. carpet area is restricted and permitted as follows

Completion of Work	Disposal of Ownership
i.Upto plinth slab	Any four units
i.On completion of Second slab	Any four units

iii. On completion of Fourth Slab	Any four units
iv. On physical completion of entire R.C.C.	Any three units
v. On physical completion of entire development	Any two unit
vi. On obtaining occupation and building completion certificate	Any one unit

. So, in this clause it is nowhere mentioned that the plaintiff was to get right to sale the suit property. In the entire agreement it is not at all mentioned that plaintiffs are having right to sale the car parking garages, open car parking spaces and basement car parking spaces, advertising spaces.

17. So, in this clause it is nowhere mentioned that the plaintiffs were to get right to sale the suit property. In the entire agreement it is not at all mentioned that the plaintiffs are having right to sale the car parking area, basement car parkings etc. i.e. the suit property. It is true that in clause no.11 of the said agreement it is mentioned that the consideration to the developer is based on development of said property with having TDR benefit of 2077 sq.mtrs and that in the event of the said benefit is extended and/or reduced the

consideration therein to the developers shall vary proportionately. So, whatever was granted to the plaintiffs was after taking into consideration the development that was to be carried as well as the TDR benefit. If plaintiffs want to allege that additional benefits were extended and as such there has been proportionate increase in the plaintiff's right to get additional developed area, it was absolutely essential for the plaintiffs to make out specific case in that behalf. However, we find that the plaintiffs' pleadings are totally lacking in that behalf. So, merely because two purchasers have purchased from the plaintiffs the garage area we cannot jump to the conclusion that the plaintiffs are entitled to entire suit property i.e. car parking garages, open car parking space, basement parking space and advertising space. We also cannot ignore the fact that there is absolutely no material on record to show as to when and how the additional benefits were acquired by the plaintiff for the same. The extended said benefit is also not pleaded by the plaintiffs, even prima facie. When such is the position the plaintiffs are not entitled to get temporary injunction as prayed.

18. It must be noted that though it is tried to be argued on behalf of the plaintiff that the defendant no.1 brought pressure on the plaintiff and got one bank account opened and that MOU dated 30-12-2005 by bringing

pressure, at this stage there is absolutely no evidence worth the name in that behalf. So, mere allegations made by the plaintiff cannot be accepted. On the contrary, we cannot ignore the fact that the plaintiffs are carrying development activities on large scale in professional manner. So, it is very difficult to believe that the plaintiffs would succumb to the pressure of defendant no.1 and execute MOU dated 30-12-2005. So, on the preponderance of probabilities the plaintiffs' case appears to be improbable. However, it seems that the learned trial Judge has not at all taken into consideration all these aspects and as such he has reached to a wrong conclusion. In my opinion, the plaintiff has utterly failed to make out any prima facie case for granting temporary injunction as prayed.

19. An attempt was made to show that even in the agreement which plaintiff got executed from his purchasers the plaintiffs had mentioned in clause 12 that owner and promoter shall have exclusive right over unsold spaces, garages,open spaces, parking spaces, even after registration of the society or even after the execution of conveyance in favour of the society. But as the said agreement is prepared by the plaintiffs it cannot be said that the defendants have admitted that promoter developer would having a right in respect of open spaces, parking space etc. So, I am not inclined to give much weightage to this agreement. If the

plaintiff would have brought any specific agreement got executed by the defendant no.1 in which the defendant no.1 had represented to purchaser that the owner and promoter developer shall have exclusive right in respect of unsold offices,open space, parking space, even after the registration of the society it could have been read against the defendants, but a document to which defendants are not party, no much importance can be given to the same.

20. So, far the above mentioned reasons I am of the view that the order passed by the learned trial Judge is not legal and correct and it is therefore necessary to interfere with the same. Hence I pass the following order :

O R D E R

. Appeal is allowed and the order passed by the learned trial Judge dated 9.7.2007 is set aside. Notice of Motion is dismissed.

. Parties to act on the authenticated copy of this order.

(S.R.SATHE,J.)